STATE OF MICHIGAN

COURT OF APPEALS

C & L WARD BROS. COMPANY,

Plaintiff-Appellant,

v

OUTSOURCE SOLUTIONS, INC., YOURSOURCE MANAGEMENT GROUP, INC., TODD LANCASTER, and JOHN DOE CORPORATIONS,

Defendants-Appellees.

UNPUBLISHED
September 2, 2014

No. 315794
Oakland Circuit Court
LC No. 2013-132137-CZ

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Plaintiff C & L Ward Bros. Company filed a complaint in the circuit court for review of an arbitration decision and subsequently filed a motion to reinstate the arbitration proceeding and to vacate the arbitrator's summary dismissal of plaintiff's claim for breach of contract. The arbitrator had concluded that the breach of contract claim was not arbitrable under the parties' contract and therefore he lacked jurisdiction to address the claim on the merits. Plaintiff appeals as of right the circuit court's order denying its motion challenging the arbitrator's ruling and dismissing plaintiff's complaint. Setting aside some procedural, jurisdictional, and briefing issues or flaws that might also support affirming the circuit court's ruling, we ultimately affirm on the basis of our agreement with the arbitrator, the circuit court, and a federal district court involved in the litigation, that plaintiff's contract claim was simply not arbitrable under the plain language of the parties' contract.

I. OVERVIEW

Plaintiff entered into a contract with defendant Outsource Solutions, Inc. (OSI), in 2003, pursuant to which OSI was to provide payroll administration services for plaintiff, which included handling the payment of all applicable local, state, and federal taxes. Years later, plaintiff accused OSI of overcharging plaintiff for payments made to cover state and federal unemployment taxes relative to plaintiff's employees, disguising the overcharge as being generally attributable to "payroll taxes," and retaining the overcharged revenue. Plaintiff initiated a class action suit against OSI, successor corporations, and various corporate officers in the United States District Court for the Eastern District of Michigan (Southern Division),

alleging fraudulent misrepresentation, fraud in the inducement, common-law and statutory conversion, violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC 1961 *et seq*., and negligence.[1] Plaintiff did not allege a claim for breach of contract. The federal court summarily dismissed the tort claims on the basis that the contract governed the obligations regarding tax payments and payroll services and that plaintiff failed to allege the existence of any legal duties separate and distinct from the contract. The federal court summarily dismissed the RICO claims on the basis that plaintiff failed to sufficiently plead fraudulent activity and the existence of a criminal enterprise.

Plaintiff, pursuant to a somewhat-limited arbitration clause contained in the contract with OSI, proceeded to commence an arbitration action for breach of contract with the American Arbitration Association (AAA). Defendants' position was that the contract claim was not arbitrable and now also barred by res judicata in light of the dismissed federal suit. Defendants' effort to reopen the federal case to procure an order enjoining the arbitration proceeding was rejected by the federal court, as the court, while sympathetic to and in agreement with defendants' stance, believed that the arbitrator had to first address the arguments against arbitration. The arbitrator subsequently ruled that it lacked jurisdiction because the mandatory arbitration language in the arbitration clause was not implicated with respect to the particular contract claim being made, rather, the claim fell within an express exception to arbitration as set forth in the arbitration clause. The arbitrator also found that the claim was now barred by res judicata given the dismissed federal lawsuit. Plaintiff then returned to the federal court in an attempt to reopen the case and pursue or add a contract claim, but the request was rejected by the court, which rejection was affirmed in *C & L Ward Bros, Co v Outsource Solutions, Inc*, 547 Fed Appx 741 (CA 6, 2013).

Plaintiff next filed a complaint for review of the arbitration decision in the state circuit court, followed by a motion to reinstate the arbitration proceeding and to vacate the arbitrator's summary dismissal of plaintiff's contract claim. Defendants challenged the motion, arguing, in part, that the arbitrator was correct in his analysis, that the circuit court itself lacked subject-matter jurisdiction to vacate the arbitrator's decision as there was no arbitration "award" for purposes of review under the arbitration statutes and court rule, and that the arbitrator did not "exceed" his powers as a matter of law considering that he declined to exercise any powers. The

[1] Plaintiff, individually and on behalf of all others similarly situated, filed the federal action against OSI, YourSource Management Group, Inc. (YMGI), which is also a defendant in the present case, Todd Lancaster, who is likewise a defendant here, John Doe Corporations, also named as defendants here, Steve Chargo, and Robert Handley. Plaintiff alleged in the federal complaint that OSI dissolved in February 2011, that services under the contract continued uninterrupted, by way of assignment or otherwise, through YMGI and/or defendant Lancaster, who was the Chief Executive Officer (CEO) of YMGI, that the John Doe corporate defendants were any and all unknown prior or current corporations utilized by YMGI to filter and manage client payrolls, that Handley, who is not named in the present litigation, was the former Chief Financial Officer (CFO) of YMGI, and that Chargo, who was also not named here, was the current CFO of YMGI.

circuit court agreed with these arguments presented by defendants and apparently disagreed with additional arguments posed by defendants that had been based on res judicata and collateral and judicial estoppel. The circuit court denied plaintiff's motion challenging the arbitration decision and dismissed plaintiff's complaint with prejudice. On appeal, plaintiff argues that the circuit court had jurisdiction to vacate the arbitrator's ruling, that the contract claim was within the scope of the mandatory arbitration language found in the arbitration clause and not the exception to arbitration, or minimally there existed an ambiguity in regard to the clause's scope necessitating a finding against OSI as the contract's drafter or further inquiry and factual development by the arbitrator, and that the res judicata issue was nothing but a red herring.

II. ANALYSIS

A. STANDARDS AND PRINCIPLES OF REVIEW

In *Ann Arbor v American Federation of State, Co, & Muni Employees (AFSCME) Local 369*, 284 Mich App 126, 144-145; 771 NW2d 843 (2009), this Court discussed the nature of our review of a circuit court's ruling relative to an arbitration decision, as well as the circuit court's review of the arbitrator's ruling:

> This Court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. Judicial review of an arbitrator's decision is narrowly circumscribed. A court may not review an arbitrator's factual findings or decision on the merits. Likewise, a reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator to determine. Nor may a court substitute its judgment for that of the arbitrator. "[H]ence [courts] are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way." The inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator. If, in granting the award, the arbitrator did not disregard the terms of his or her employment and the scope of his or her authority as expressly circumscribed in the contract, "'judicial review effectively ceases.'" Thus, "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,'" a court may not overturn the decision even if convinced that the arbitrator committed a serious error. [Citations omitted.]

We review de novo whether an arbitrator exceeded his or her authority, *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005), jurisdictional issues, *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013), matters involving the interpretation or legal effect of a contract, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005), the construction of court rules and statutes, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008), and "the application of legal doctrines, such as res judicata and collateral estoppel," *id.*

B. DISCUSSION

The Michigan arbitration act (MAA), MCL 600.5001 *et seq.*, was repealed by our Legislature pursuant to 2012 PA 370 and replaced by the uniform arbitration act (UAA), MCL 691.1681 *et seq.*, which was enacted pursuant to 2012 PA 371. The repeal of the MAA and the

enactment of the UAA became effective July 1, 2013. See 2012 PA 370 and 371. The UAA provides that "[o]n or after July 1, 2013, this act governs an agreement to arbitrate whenever made." MCL 691.1683(1). The circuit court order being appealed was entered on April 8, 2013; therefore, the now-repealed MAA still applied to the proceedings. MCR 3.602(A), which has yet to be amended, provides that "[t]his rule governs statutory arbitration under MCL 600.5001 – 600. 5035[,]" i.e., arbitration under the MAA. MCL 600.5001(2) provided:

> A provision in a written contract to settle by arbitration under this chapter, a controversy thereafter arising between the parties to the contract, with relation thereto, and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. Such an agreement shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract. Any arbitration had in pursuance of such agreement shall proceed and the award reached thereby shall be enforced under this chapter.

Here, the arbitration clause in the parties' contract provided for the entry of a judgment on an arbitrator's award, thereby qualifying any contract-related arbitration proceeding as *statutory* arbitration as opposed to common-law arbitration. *Wold Architects & Engineers v Strat*, 474 Mich 223, 229-230; 713 NW2d 750 (2006).

MCL 600.5025 provided:

> Upon the making of an agreement described in section 5001, the circuit courts have jurisdiction to enforce the agreement and to render judgment on an award thereunder. The court may render judgment on the award although the relief given is such that it could not or would not be granted by a court of law or equity in an ordinary civil action.

Under MCR 3.602(J)(1), "[a] request for an order to vacate an arbitration *award* under this rule must be made by motion." (Emphasis added.) Pursuant to MCR 3.602(J)(2)(c), "[o]n motion of a party, the court shall vacate an [arbitration] *award* if . . . the arbitrator exceeded his or her powers." (Emphasis added.)[2]

[2] MCR 3.602(I) provides:

> An arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.

Defendants, relying exclusively on caselaw from foreign jurisdictions, argue that the arbitrator never entered an "award."[3] Rather, according to defendants, the arbitrator simply declined to exercise jurisdiction over the contract claim on the basis that the claim fell outside the scope of arbitration, which ruling did not constitute or entail an award. Defendants maintain that given the absence of an "award" that could potentially be vacated, the circuit court lacked subject-matter jurisdiction over plaintiff's challenge. Even though the circuit court found that it lacked subject-matter jurisdiction on the basis of defendants' "award" argument, forming one of the grounds supporting the court's ruling to deny plaintiff's motion, plaintiff entirely fails to address the issue in its main brief on appeal. When an appellant fails to dispute or challenge a legal basis given by a trial court that, standing alone, fully supports the court's resolution of a claim, we need not even consider granting the appellant's requested relief. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Plaintiff alludes to the issue in a reply brief, cursorily arguing that there is no binding authority supporting defendants' position and that the only real issue, relative to triggering the circuit court's power or jurisdiction, was whether the arbitrator exceeded his authority, not whether an "award" was entered. However, "[r]eply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Despite plaintiff's briefing failure, which alone supports affirmance, we shall continue with our analysis.

While there is some textual logic to defendants' argument that only an "award" can be judicially reviewed and that there was no "award" entered by the arbitrator, we find it unnecessary to specifically determine whether the arbitrator's ruling constituted an "award" subject to circuit court review.[4] The arbitrator's ruling certainly does not have the typical characteristics or features of an arbitration "award," but then the arbitrator's decision that the contract claim was not arbitrable was not the type of ruling that arbitrators ordinarily have the authority or jurisdiction to make in the first place under Michigan law. Assuming for the sake of argument that the arbitrator's order of dismissal was an "award" subject to review or that the ruling was otherwise reviewable, the ruling could be viewed as having exceeded the arbitrator's powers, MCR 3.602(J)(2)(c), but not in the manner argued by plaintiff. Plaintiff's argument is merely that the arbitrator exceeded his powers by misinterpreting the nature of plaintiff's contract claim and incorrectly concluding that it fell within the parameters of the exception to

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[3] See, e.g., *Western Agricultural Ins Co v Chrysler Corp*, 198 Ariz 64, 68; 6 P3d 768 (Ariz App, 2000) ("A decision regarding whether a dispute is arbitrable does not constitute an award.").

[4] We do note that MCL 600.5035 provided, in part, that nothing contained in the MAA "shall be construed to impair, diminish, or in any manner to affect the equitable power and authority of any court over *arbitrators, awards,* ***or*** *the parties thereto*[.]" (Emphasis added.) "[T]he statute ma[de] clear that the court retains all its equitable powers over arbitration proceedings." *DAIIE v Gavin*, 416 Mich 407, 433-434; 331 NW2d 418 (1982). Perhaps MCL 600.5035 provided a jurisdictional basis for the circuit court to review the arbitrator's dismissal decision under the unique procedural posture of this case even if an "award" must typically be entered to implicate a court's jurisdiction and assuming the arbitrator's decision did not constitute an "award."

arbitration found in the arbitration clause.[5] We instead question whether the arbitrator even had the power or jurisdiction to determine the arbitrability of the contract claim.

"Arbitrators exceed their powers whenever they act beyond the material terms of the contract from which they draw their authority *or in contravention of controlling law*." *Miller*, 474 Mich at 30, citing *DAIIE v Gavin*, 416 Mich 407, 433-434; 331 NW2d 418 (1982) (emphasis added). Our Supreme Court in *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98-99; 323 NW2d 1 (1982), after first referencing MCL 600.5025 and its jurisdictional attributes, observed:

> Whenever the jurisdiction of an arbitrator is questioned, it must be determined in order to make an award on arbitration binding. The existence of a contract to arbitrate and the enforceability of its terms is a judicial question which cannot be decided by an arbitrator.

In *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004), this Court stated:

> The existence of an arbitration agreement and the enforceability of its terms are judicial questions for *the court, not the arbitrators*. *Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74; 492 NW2d 463 (1992). . . . "To ascertain the arbitrability of an issue, [a] *court* must consider whether there is an arbitration provision in the parties' contract, *whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract*." *Huntington Woods*, *supra* at 74-75. The *court* should resolve all conflicts in favor of arbitration. *Id.* at 75. However, a *court* should not interpret a contract's language beyond determining whether arbitration applies . . . . [Emphasis added; see also *Watts v Polaczyk*, 242 Mich App 600, 608; 619 NW2d 714 (2000).]

So while an arbitrator can engage in construing a contract in the process of addressing the merits of an arbitration claim and resolving the dispute, *AFSCME Local 369*, 284 Mich App at 144-145, it is a court of law, through interpretation of an arbitration clause in conjunction with contemplation of a party's particular claim alleged to be arbitrable, that decides the *arbitrability* of the claim in the first instance. This proposition found force in MCL 600.5025, which provided that "the circuit courts have jurisdiction to enforce the [arbitration] agreement." The principle that a court and not an arbitrator decides whether a claim is subject to arbitration is further reflected in MCR 3.602(B).[6] We do note, however, that the arbitration clause, as pointed

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[5] We shall address this argument later in the opinion.

[6] MCR 3.602(B) provides in part:

> (2) On motion of a party showing an agreement to arbitrate that conforms to the arbitration statute, and the opposing party's refusal to arbitrate, the court may order the parties to proceed with arbitration and to take other steps necessary

out by the federal district court, included an agreement that the arbitrator would "conduct all proceedings pursuant to the Commercial Rules of the [AAA]." And Commercial Rule 7 of the AAA provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." We ultimately decline to decide, for the reasons expressed below, whether the arbitration clause and its incorporation of AAA Rule 7 could effectively overcome Michigan authorities which dictate that courts and not arbitrators decide whether a claim or issue is arbitrable.[7]

> to carry out the arbitration agreement and the arbitration statute. *If the opposing party denies the existence of an agreement to arbitrate, the court shall summarily determine the issues and may order arbitration or deny the motion*.
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> (3) On motion, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. *If there is a substantial and good-faith dispute, the court shall summarily try the issue and may enter a stay or direct the parties to proceed to arbitration*. [Emphasis added.]

[7] Despite defendants' best attempt to have the federal court enjoin the arbitration proceeding and decide the issue of arbitrability, the federal court, while tending to agree with defendants' position, declined to rule on the matter. Indeed, plaintiff argued to the federal court that the arbitrator should make the determination regarding whether the contract claim was arbitrable. While the parties' contract was expressly "governed by the laws of the State of Michigan," and not federal law, federal law also recognizes that the question concerning whether a dispute is subject to arbitration is ordinarily to be resolved by the courts and not arbitrators. See *Granite Rock Co v Int'l Brotherhood of Teamsters*, 561 US 287, 296; 130 S Ct 2847; 177 L Ed 2d 567 (2010) (It is well-settled that whether parties have agreed to submit a specific dispute to arbitration is generally an issue for judicial determination.); *AT&T Technologies, Inc v Communications Workers of America*, 475 US 643, 649; 106 S Ct 1415; 89 L Ed 2d 648 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator[,]" and the determination of "what issues [a party] must arbitrate[] is a matter to be determined by the Court on the basis of the contract entered into by the parties.") (quotation marks omitted); *Cox v Ocean View Hotel Corp*, 533 F3d 1114, 1119 (CA 9, 2008) (The federal arbitration act [FAA], 9 USC 1 *et seq.*, limits a court's involvement to determining whether a valid arbitration agreement exists and, if one does exist, whether the agreement encompasses the dispute at issue.). This federal caselaw does indicate that the parties can specifically agree to have an arbitrator decide whether a claim is arbitrable, so perhaps the federal court was correct in its analysis if federal law had been applicable. Michigan authorities, cited above, seem to suggest that the arbitrability of a claim under our laws is an issue of subject-matter jurisdiction that falls within the jurisdiction of a court and not an arbitrator, and, in general, parties cannot stipulate to, waive, or consent to subject-matter jurisdiction. *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011). Additionally, this Court has stated that "contract provisions that assign new roles to courts and arbitrators impermissibly usurp the authority of the court rules and the arbitration statutes." *Fromm*, 264 Mich App at 306. In the procedural posture the parties and the arbitrator found

Disregarding defendants' jurisdictional argument relative to the alleged lack of an "award" and even assuming that the arbitrator exceeded his authority by resolving the issue whether the contract claim was arbitrable, we nevertheless affirm the circuit court's ruling not to vacate or otherwise disturb the arbitrator's decision.[8] The record clearly reflects that the circuit court was of the view, as had been the federal court and the arbitrator, that plaintiff's particular contract claim fit within the exception to arbitration found in the arbitration clause. As cited earlier, MCL 600.5001(2) provided that an agreement to arbitrate "shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract." Therefore, even though the matter perhaps should have been directly presented to and decided by a court and not the arbitrator, and regardless of the soundness of the procedural and jurisdictional mechanics that eventually led to the circuit court reviewing and deciding the case, the circuit court ultimately agreed that the contract claim was not arbitrable, and, as will be explained below, the court's conclusion was legally correct.

The parties' contract specified that OSI was "an independent contractor . . . engaged in the business of providing professional employer services[.]" The contract was for a one-year period, subject to automatic renewal for one-year periods until terminated by either party with 30 days prior written notice. Under the contract, OSI was required to provide payroll services, "including payment of applicable federal, state, and local taxes the responsibility for which [OSI] shall assume in respect of Employees without regard to the receipt of payment from [plaintiff]." The contract further provided that plaintiff was to pay OSI "a service fee equal to the calculation as shown on Exhibit D, which is attached and made a part of this Agreement." Exhibit D was a "Proposal" booklet from YourSource, Inc., to plaintiff, which included a single page comparing, in two columns, the cost of plaintiff using its own in-house human resources department to administer payroll and other employee services to the cost that would be incurred in having YourSource, Inc., administer payroll and other services.[9] Using an annual gross payroll of $1,495,123 for purposes of illustration, the document reflected that plaintiff would realize a yearly savings of $12,708 by utilizing the "YourSource Solution," given that in-house administration through an employee would cost $37,378 but the YourSource Solution would only cost $24,670, which fee was arrived at by multiplying the sample annual gross payroll by 1.65%. In both columns in the side-by-side comparison between in-house costs and the YourSource costs was the identical amount of $156,988 with respect to the category of "Payroll

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themselves in, i.e., being advised by the federal court to proceed with arbitration and have the arbitrator decide the threshold issue of the arbitrability of the contract claim, it is understandable that they so proceeded. We do question whether the federal court even had jurisdiction to twice entertain matters presented to the court after the case was dismissed, given that its jurisdiction in the case had been based on federal-question and supplemental jurisdiction, 28 USC 1331 and 1367, that the federal RICO claims had been summarily dismissed, and considering that no party sought to reopen the case relative to the RICO claims.

[8] We shall also proceed on the assumption that an arbitrator exceeds his or her powers, MCR 3.602(J)(2)(c), when incorrectly determining under the law that a particular claim or issue is subject to arbitration, despite the caselaw which fairly clearly indicates that we generally may not overturn an arbitrator's decision relative to construction of a contract "even if convinced that the arbitrator committed a serious error." *AFSCME Local 369*, 284 Mich App at 144-145.

[9] We note that YourSource, Inc., was apparently a different entity than defendant YMGI.

Taxes on Gross Payroll." The amount of $156,988 was calculated by multiplying 10.5% by the sample annual gross income.

The last paragraph in the plaintiff-OSI contract addressed arbitration of disputes, providing as follows:

> **Independent Legal Advice.** In the event of a disagreement between the Parties or their successors as to the construction of any clause of this Agreement or as to the rights or obligations hereunder, except as to those clauses of this Agreement regarding [plaintiff's] obligations to make payments to [OSI], such issues shall be resolved by arbitration. Either party may elect to arbitrate the dispute by serving written notice upon the other Party. The dispute shall be resolved by an arbitrator selected from a panel provided by the [AAA]. The arbitrator shall render a decision within sixty (60) days after their appointment and shall conduct all proceedings pursuant to the Commercial Rules of the [AAA]. Judgment upon the award rendered pursuant to the arbitration may be entered in any court having jurisdiction. The cost of the arbitration shall be borne by the losing party or, if the decision is not clearly in favor of one party or the other, then the costs shall be borne as determined by the arbitrator. The Parties agree that the arbitration procedure herein shall be the sole and exclusive remedy to resolve any controversy or dispute arising under this Agreement.

The federal-action defendants had noted in their brief in support of dismissal that OSI regularly sent plaintiff "invoices reflecting two separate, agreed-upon charges: the charge of 1.65% of payroll for the human resource administration (later reduced to 1.25%) and the additional charge of 10.5% of gross payroll for payroll taxes," which plaintiff "dutifully paid . . . and did not question . . . until December 2010." We note that the contract was terminated in 2011. The federal-action defendants asserted that plaintiff's claim that they were overcharged more than $450,000 was based on the mistaken assumptions that plaintiff was not obligated to pay for tax-related services at the *flat rate* of 10.5% of gross annual payroll and that plaintiff's sole contractual obligation in regard to tax-related services was to simply reimburse OSI "for the employer-side tax payments that [OSI] *actually made*." (Emphasis added.) In other words, defendants' position was that plaintiff was obligated to pay OSI 10.5% of the gross annual payroll for purposes of taxes and tax-related services regardless of how much in taxes was actually paid by OSI to the state and federal governments. Accordingly, there were no overcharges or overpayments under the terms of the contract and plaintiff's claims regarding fraudulently-calculated state and federal unemployment taxes had no basis in law or fact.[10] On

[10] Plaintiff had maintained that employers are required to pay Michigan unemployment taxes on the first $9,000 of each employee's annual wages, while employers are required to pay federal unemployment taxes on the first $7,000 of each employee's annual wages. Plaintiff alleged that OSI instead billed and collected from plaintiff an amount for state and federal unemployment taxes that was based on an employee's entire annual gross wages, retaining the additional revenue and using it to continue funding defendants' corporations. Plaintiff contended that

the other hand, plaintiff's position was that the only "fee" that it was contractually bound to pay was the one calculated by multiplying 1.65% by the gross annual payroll.[11] And as far as taxes were concerned under the contract, plaintiff's stance was that OSI was obligated to pay the taxes, with plaintiff then simply reimbursing OSI for those tax payments actually made to the state and federal governments; there was no separate, additional fee for OSI's tax-related services.[12]

In its arbitration complaint, plaintiff alleged that defendants "breached the contract by overcharging [plaintiff] service fees in excess of the 1.65% agreed upon in the contract" and "by concealing the overcharges on invoices to [plaintiff] with all charges lumped together deceptively identified only as 'payroll taxes[.]'"[13] It is abundantly clear that the gravamen of plaintiff's arbitration action and breach of contract claim was that plaintiff was billed more by defendants than allowed under the terms of the contract and that it paid more to defendants than it was contractually obligated to pay. The arbitration provision expressly excludes from arbitration a disagreement with respect to the construction of any contractual clause regarding plaintiff's obligation to make payments to OSI. Such a disagreement was precisely what plaintiff alluded to in its contract claim and was at the heart of the contract dispute. Plaintiff asserted that it was only required to pay the 1.65% / 1.25% fee and no more and certainly not the 10.5% rate to the extent that it exceeded the actual taxes due and paid, effectively becoming a second fee. The substance of the dispute would require construction of the clause which provided for the payment of "a service fee equal to the calculation as shown on Exhibit D," construction of Exhibit D as made part of the contract, and construction of the clause which provided that OSI was required to provide payroll services, "including payment of applicable federal, state, and local taxes[.]" And the purpose of construing these provisions would be to, as stated in the arbitration exception, ascertain plaintiff's "obligations to make payments to [OSI]." Whether there had been an "overcharge" as alleged in the arbitration complaint is inextricably connected to the question regarding plaintiff's payment obligations under the contract.

Plaintiff argues that the clause requiring OSI to provide payroll services to plaintiff, "including payment of applicable federal, state, and local taxes," did not pertain to plaintiff's obligation to make payments to OSI, and therefore the exception to arbitration was not triggered.

OSI's practices resulted in plaintiff paying $458,183 more to OSI than it should have paid to cover the actual state and federal unemployment taxes.

[11] We do note that at the federal stage of the litigation, plaintiff had taken the position that there was no valid, enforceable contract between the parties and thus plaintiff was not pursuing a contract claim. Apparently, it was plaintiff's view at the time that while it had received, reviewed, and discussed by the date of the contract's execution the YourSource, Inc.'s Proposal booklet that contained the page with the 1.65 and 10.5 percentages, the booklet and/or page was never specifically identified as being "Exhibit D." However, plaintiff later effectively backtracked on any challenge to the substance of Exhibit D and reversed course entirely regarding the existence of a valid and enforceable contract.

[12] While there does appear to be some merit to plaintiff's substantive claim, as also recognized by the arbitrator, the issue is not one that we can reach.

[13] Elsewhere in the arbitration complaint, plaintiff acknowledged that the 1.65% rate relative to the annual gross payroll was "later reduced to 1.25%."

We disagree. The clause cannot be viewed in a vacuum but would need to be examined and analyzed in conjunction with the other clauses referenced above in order to coherently and soundly determine plaintiff's payment obligations under the contract. Moreover, even when viewed in isolation, the clause cited by plaintiff could arguably be the determinative provision relative to the nature of plaintiff's payment obligation, as it could perhaps be viewed as the contract's sole clause directly related to tax-payment services, yet it did not provide for a fee being assessed against plaintiff. In other words, it may indirectly or implicitly pertain to plaintiff's payment obligations. Indeed, in plaintiff's own appellate brief, it states that the clause requiring OSI to cover the tax payments "did [not] authorize [OSI] to collect amounts above and beyond the actual statutory payroll taxes." Thus, plaintiff itself acknowledges that the clause has a bearing on its contractual payment obligations.

Plaintiff next argues that OSI breached the contract by skimming profits for itself from the payroll tax overcharges. But this argument is necessarily tied to the question of plaintiff's payment obligations under the contract, considering that there would be no contractual breach for the skimming of profits if OSI collected from plaintiff an amount plaintiff was actually obligated to pay OSI under the contract. Plaintiff additionally argues that the only provision in the contract that required it to compensate OSI for its services was the clause providing for the payment of "a service fee equal to the calculation as shown on Exhibit D." Therefore, argue plaintiffs, the "breach of contract claim has nothing to do with its 'obligations to make payments.'" We fail to see the logic in this argument. It appears to be more of an argument with respect to why plaintiff would be successful in litigating a breach of contract claim, as opposed to circumventing a conclusion that the contract claim concerned plaintiff's payment obligations under the contract.

Plaintiff, adamantly and with emphasis, next argues that nowhere in the contract was there a provision that allowed OSI to "collect monies beyond the actual . . . taxes charged by the applicable taxing authorities," nor was there any provision that obligated plaintiff to pay over and above the service fee of 1.65% or 1.25% as later reduced. Again, these arguments go to the substance or merits of the contract claim and do not defeat our ruling that the contract claim would entail construction of the contract to determine plaintiff's payment obligations thereunder, thereby falling within the confines of the arbitration exception. Countering plaintiff's argument on the merits of the dispute is defendants' substantive argument that contractual language did require plaintiff to pay more than the 1.65% / 1.25% or the actual taxes assessed. The dispute would require interpretation of contractual clauses with respect to determining plaintiff's payment obligations.

Plaintiff further argues that the arbitration exception in the arbitration clause pertained solely to collection matters in case plaintiff stopped paying its bills, thereby allowing OSI to avoid arbitration in any attempt to recover amounts owing by plaintiff. We again fail to see the logic in plaintiff's argument. Plaintiff is apparently comparing an arbitration proceeding to a collection effort, such as employment of a collection agency, which does not reach the level of court litigation. We conclude, however, that the arbitration clause plainly and unambiguously concerns ultimate dispute resolution as between the contracting parties in either a court or arbitration forum. Nothing under our construction of the arbitration clause would have prevented OSI to initially pursue out-of-court collection efforts against plaintiff had monies actually been allegedly due under the contract, with any unresolved dispute concerning contract interpretation and plaintiff's payment obligations thereafter being submitted to arbitration. In sum, the arbitration exception applied.

Plaintiff next contends that the arbitration clause was ambiguous and should therefore either be construed against OSI as the contract's drafter under the doctrine of contra proferentem or the matter should be remanded to the arbitrator for further factual and legal development regarding the parties' intent. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory*, 473 Mich at 464. "If the language of [a] contract is unambiguous, we construe and enforce the contract as written." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). A contract is ambiguous if its provisions are capable of conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). If the contract language is ambiguous, "the ambiguous language presents a question of fact to be decided by a" trier of fact. *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006). In *Klapp*, 468 Mich at 470-471, our Supreme Court discussed the rule of contra proferentem, observing:

> In interpreting a contract whose language is ambiguous, the jury should also consider that ambiguities are to be construed against the drafter of the contract. This is known as the rule of contra proferentem. However, this rule is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean. [Citations omitted.]

"The rule of contra proferentem is a rule of last resort because, 'The primary goal in the construction or interpretation of any contract is to honor the intent of the parties,' and the rule of contra proferentem does not aid in determining the parties' intent." *Id.* at 473 (citation omitted).

The heading or prefatory language of the arbitration clause was "Independent Legal Advice" and the last sentence of the clause stated, "The Parties agree that the arbitration procedure herein shall be the sole and exclusive remedy to resolve *any* controversy or dispute arising under this Agreement." (Emphasis added.) Plaintiff argues that this language created an ambiguity in regard to the scope of the arbitration clause. With respect to the heading, the contract itself provided that "[t]he headings of this Agreement are inserted solely for the convenience of reference. They shall in no way define, limit, extend or aid in the construction, extent or intent of this Agreement." Accordingly, the heading of the arbitration clause is irrelevant and does not create any ambiguity in regard to the interpretation of the arbitration clause. With respect to the final sentence in the arbitration clause, if read standing alone or independently from the remainder of the clause, it would indicate that any controversies or disputes arising between the contracting parties were subject to arbitration. However, the final sentence must be read in conjunction with the preceding language in the clause, including the language carving out the exception to arbitration. The final sentence was clearly intended to encompass any controversies or disputes arising under the contract as framed by the introductory sentence in the arbitration clause, which set the scope of arbitration. Any other interpretation would render completely meaningless and nugatory the arbitration exception that was expressly agreed to by the parties. *Klapp*, 468 Mich at 468 ("[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory."). Accordingly, we hold that there was no ambiguity in regard to the arbitration clause and its explicit exception to arbitration.

Given our holding and, ostensibly, the circuit court's refusal to base its decision on the doctrines of res judicata and collateral and judicial estoppel, there is no need for us to address these doctrines.[14] That said, we do wish to briefly touch on res judicata and collateral estoppel. Defendants' suggestion that the contract claim in the arbitration proceeding was barred by res judicata regardless of whether it was arbitrable has no merit. If the contract claim was not arbitrable, as we have concluded, the doctrine of res judicata becomes entirely irrelevant because the arbitrator would have no authority or jurisdiction to address the substance or merits of the contract claim, let alone entertain a res judicata argument. If plaintiff were to pursue new court litigation, res judicata would likely apply, but we take no position on that matter and the issue would be one for the forum court. Had the contract claim been subject to mandatory arbitration, it would not have been barred by res judicata, given that the contract claim could not have been pursued in the federal court in light of the mandatory arbitration. See *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006) (Res judicata requires, in part, that "the matter contested in the second case was or could have been resolved in the first [case]."). Finally, collateral estoppel, premised on the federal court's statements and ruling, did not bar the arbitrator or the circuit court from potentially ruling in favor of arbitrability, considering that the federal court's belief that the contract claim was not arbitrable did not concern a question of fact, but one of law, and because the federal court did not enter a conclusive, binding, and final order on the subject, deferring to the arbitrator. See *Monat v State Farm Ins Co*, 469 Mich 679, 682-683; 677 NW2d 843 (2004) (Collateral estoppel requires, in part, that "'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment.'") (citation omitted).

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[14] It is also unnecessary to address and resolve defendants' argument that defendant Lancaster cannot be held liable for breach of contract considering that he was not a party to the contract.